BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

MICHAEL FEDERKO, Claimant, v. SUN VALLEY COMPANY, Employer / Self-Insured, Defendant.	)	**IC 2008-017353** **ORDER DENYING RECONSIDERATION** Filed June 3, 2011

Pursuant to Idaho Code § 72-718, Claimant moves for reconsideration of the Commission's decision in the above-captioned case. Claimant argues that Defendant waived its notice defense and should be estopped from asserting the defense. Claimant further argues that the Commission erred in finding that Claimant failed to prove that his pulmonary emboli were caused by the industrial accident, and he contends that the Commission abused its discretion and "chilled" Claimant's right to appeal by making this finding. Defendants reply that the Commission has already addressed Claimant's statutory waiver argument, that Claimant's equitable waiver and estoppel arguments have been raised for the first time on reconsideration and should not be addressed, that the facts of this case do not warrant application of waiver or quasi-estoppel, that Claimant's arguments regarding causation have already been considered by the Commission, and that the Commission did not abuse its discretion by addressing the causation issue.

A decision of the Commission, in the absence of fraud, shall be final and conclusive as to all matters adjudicated, provided that within twenty days from the date of filing the decision, any party may move for reconsideration. Idaho Code § 72-718. A motion for reconsideration must

"present to the Commission new reasons factually and legally to support [reconsideration] rather than rehashing evidence previously presented." *Curtis v. M.H. King Co.*, 142 Idaho 383, 128 P.3d 920 (2005). The Commission is not inclined to reweigh evidence and arguments simply because the case was not resolved in the party's favor.

I.

WAIVER AND QUASI-ESTOPPEL

In this case, Defendant initially paid workers' compensation benefits to Claimant before ultimately denying the claim. The decision held that the claim was barred due to Claimant's failure to timely provide notice of his industrial accident. On reconsideration, Claimant argues that Defendant's voluntary payments constitute a waiver of Defendant's right to assert notice as a defense to the claim. Claimant states he posed this waiver argument to the Commission in his post-hearing brief, and that the decision failed to address it. Defendant responds that the Commission did address Claimant's statutory waiver argument, and that this "equitable" waiver argument is an impermissible new argument made for the first time on reconsideration. Before we address the substance of Claimant's argument, we must first determine whether it is impermissible to raise new arguments on reconsideration, and, if so, whether Claimant's arguments are new.

As discussed in the *Curtis* case, cited above, the Commission may consider "new reasons, factually and legally" to alter a decision on a motion for reconsideration. In fact, it is a "rehash" of old arguments, already addressed, that is discouraged on reconsideration. Therefore, we do have the authority to consider the equitable waiver and estoppel arguments, regardless of whether they are new.[1]

[1] We note that the waiver argument posed by Claimant in pages five and six of his post-hearing brief contains multiple references to Idaho Code § 72-701, including the quote "if payments of compensation have been made

A.

WAIVER

Claimant argues that if Defendant intended to raise the notice defense, the time to do so was before Defendant made the decision to pay benefits. "By accepting and paying the claim, the Defendant waived [its] defense under Idaho Code § 72-701." *See* Memorandum in Support of Claimant's Motion for Reconsideration, p. 2. Claimant bases this argument on the statutory command that process and procedure under the workers' compensation statutes be "as far as possible in accordance with the rules of equity." *See* Idaho Code § 72-708. It would be inequitable, Claimant argues, to permit Defendant to assert notice as a defense when Defendant made voluntary payments.

A waiver is a voluntary and intentional relinquishment of a known right or advantage. *Frontier Fed. Sav. & Loan v. Douglass*, 123 Idaho 808, 812, 853 P.2d 553, 557 (1993). Waiver will not be inferred; the intent to waive must be clear. *Riverside Development Co. v. Ritchie*, 103 Idaho 515, 520, 650 P.2d 657, 662 (1982). The party asserting waiver must show that he acted reasonably in reliance upon it and that he has altered his position to his detriment. *Margaret H. Wayne Trust v. Lipsky*, 123 Idaho 253, 256, 846 P.2d 904, 907 (1993).

Defendant argues that it neither waived nor intended to waive its notice defense when it chose to make payments to Claimant. Rather, Defendant made a business decision to pay what, at the time, appeared to be a small claim. Later, when it became apparent that the claim was significant, Defendant chose to assert the notice defense. Even if paying the benefits did constitute a waiver, Claimant's argument must still fail, because Claimant has not shown how he

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voluntarily … the making of a claim within said period shall not be required." This appears to be an argument about statutory waiver, and, as Defendant argues, the issue of statutory waiver was addressed in the Commission's decision. *See* Findings of Fact, Conclusions of Law, and Recommendation ¶¶ 26-27. Claimant's reply brief also argues waiver in the context of Section 72-701, including the same quote about voluntary payments. Equity and quasi-estoppel are not mentioned in either brief. We agree with Defendant that these arguments are new.

relied upon the waiver and changed his position to his detriment.

We are not persuaded by Claimant's waiver argument for several reasons. First, it is the policy of the workers' compensation statutes to encourage "sure and certain relief" for injured workers. *See* Idaho Code § 72-201. It would be contrary to this policy to discourage employers from making voluntary payments on a claim, while still investigating it, if we held that, in making such payments, employers forfeit their right to assert notice as a defense. Such a holding would compel employers to refuse to pay anything until they were certain they would accept the claim, and if this happened, injured workers might go without necessary medical care until such time as the investigation concluded.

Second, we are not persuaded that the mere act of paying benefits constitutes a "voluntary and intentional relinquishment" of Defendant's right to assert notice as a defense. In support of his argument, Claimant cites to the testimony of various witnesses, including Defendant's human resources director, indicating that Defendant had "reservations" about the claim from the outset, particularly about the timing of the claim. Nevertheless, Defendant chose to accept the claim. Claimant argues this shows that Defendant was aware of its notice defense and chose to waive it by making payments despite these reservations. We disagree. Waiver, as the case law establishes, will not be inferred. It must be clear. Claimant does not cite to any evidence showing that Defendant expressly waived its notice defense. The testimony indicates that Defendant believed the claim was too small to be worth disputing. Defendant did not voluntarily, intentionally relinquish its defense, because at the time Defendant made the decision to pay benefits, Defendant did not believe it would have to assert a defense. Defendant believed the claim — entirely medical in nature, at that point — would be quickly resolved and closed. When Defendant made the payments, it was in an attempt to expeditiously satisfy a small claim.

It was not an action intended to waive a potential defense.

Finally, Claimant has failed to show that he acted reasonably in reliance on a waiver, and that he changed his position to his detriment because of it. This case would be different if, for example, Claimant attempted to timely provide notice of the accident, and Defendant informed him that he did not need to provide notice and that his claim would not be disputed. In such a situation, it would be reasonable for Claimant to rely on Defendant's representation. Such is not the case here, however. Claimant did not inform Defendant of his accident until well after the statutory period for providing notice had passed, and Claimant has provided no evidence establishing that he relied on Defendant's supposed waiver, or that he has changed his position to his detriment.

We find that Defendant did not waive its right to assert notice as a defense.

B.

QUASI-ESTOPPEL

Claimant next argues that Defendant should be estopped from asserting notice as a defense under the doctrine of quasi-estoppel. This doctrine prevents a party from asserting a right, to the detriment of another party, which is inconsistent with a position previously taken. *C & G, Inc. v. Canyon Highway Dist. No. 4*, 139 Idaho 140, 144, 75 P.3d 194, 198 (2003). The doctrine applies when the offending party takes a position different than his original position, and 1) the offending party gained an advantage or caused a disadvantage to the other party, 2) the other party was induced to change positions, or 3) it would be unconscionable to permit the offending party to maintain an inconsistent position from one he or she has already derived a benefit from or acquiesced in. *Thomas v. Arkoosh Produce, Inc.*, 137 Idaho 352, 357, 48 P.3d 1241, 1246 (2002). For quasi-estoppel to apply, the party asserting it need not show detrimental

reliance; rather, there must be evidence that it would be unconscionable to permit the offending party to assert allegedly contrary positions. *Atwood v. Smith*, 143 Idaho 110, 114, 138 P.3d 310 314 (2006).

Claimant argues that, by paying benefits and accepting the claim, and then asserting the notice defense, Defendant has taken inconsistent positions, and it would be unconscionable to permit Defendant to maintain the defense. Defendant responds that it never changed its position and that, even if it had, it has not gained some unconscionable advantage by doing so.

We agree with Defendant. The position Defendant asserted at hearing, and that Claimant seeks to have Defendant estopped from invoking, is that Claimant did not provide timely notice. Defendant has never taken the position that notice was timely. Therefore, Defendant's position has not changed. It is true that Defendant at first accepted the claim and later denied it, but as Claimant himself concedes, this is common and permissible in the workers' compensation setting.

We find that Defendant is not estopped from asserting notice as a defense.

II.

CAUSATION

Claimant further asserts that the Commission erred in its conclusion that Claimant failed to prove his industrial accident caused his pulmonary emboli. Defendant contends that Claimant's arguments regarding this issue are essentially the same as those posed to the Commission in Claimant's post-hearing brief, and have thus already been considered. We agree. The Commission carefully considered all arguments and evidence in the record before issuing the decision, and the substantial, competent evidence in the record supports the causation conclusion as it stands. We decline to reconsider our findings and conclusions regarding

causation.

III.

ABUSE OF DISCRETION

In the decision, the Commission observed that notice was a threshold issue, and, having determined that Claimant's claim was barred due to untimely notice, the Commission was not required to make findings on the other issues before it. However, the Commission proceeded to make findings on the issue of causation. Claimant argues that by doing this, the Commission has "created a chilling effect on the Claimant's right to appeal the legal question that was ultimately used to decide the matter." Memorandum in Support of Claimant's Motion for Reconsideration, p.10. It is well-established that, while the Supreme Court exercises free review over the Commission's legal conclusions, the Court will uphold the Commission's findings of fact if they are supported by substantial, competent evidence. *See e.g. Page v. McCain Foods*, 141 Idaho 342, 344, 109 P.3d 1084, 1086 (2005). The Court will not reweigh evidence or consider whether it would have come to a different conclusion. *Id*. Essentially, Claimant is arguing that, by making findings on a factual issue as well as a legal issue, the Commission has made the decision more difficult to appeal, which discourages Claimant from seeking review on the dispositive legal issue. In chilling Claimant's right to appeal, the Commission has abused its discretion.

Defendant admits confusion as to Claimant's chilling argument, but posits that the Commission, by making findings on more than one issue, was acting in the interest of judicial economy. If the matter is appealed, then the Court will be able to address multiple issues at once, which will reduce the odds of future appeals.

Pursuant to Idaho Code § 72-707, the Commission has the authority to decide all questions arising under the workers' compensation statutes. In this case, the issue of causation,

as well as the issue of notice, is a question arising under the workers' compensation statutes. The issue of causation was noticed for hearing pursuant to Idaho Code §§ 72-712 and 72-713. It is thus clearly within the Commission's purview to make findings on this issue, and Claimant has failed to cite any authority, statutory or otherwise, holding that where the Commission has made findings on a threshold issue, it abuses its discretion by making findings on other noticed issues.

Claimant's right to appeal has not been chilled by the Commission's findings on multiple issues. That different standards of review exist for the Commission's factual findings and legal conclusions is irrelevant. Claimant's right to appeal has not been discouraged simply because there is more than one issue for the Court to review; many appeals involve multiple issues with varying standards of review. We note, too, that the actual holding Claimant objects to — that Claimant failed to meet his burden of proof on the issue of causation — is a legal conclusion, not a finding of fact. It is a conclusion supported by certain findings of fact, to be sure, but so, too, is the conclusion that Claimant failed to provide timely notice.

We find that we have not abused our discretion by deciding the issue of causation.

Based on the foregoing analysis, Claimant's motion for reconsideration is DENIED.

IT IS SO ORDERED.

DATED this _3rd__ day of June, 2011.

INDUSTRIAL COMMISSION

_/s/_____
Thomas E. Limbaugh, Chairman

_/s/_____
Thomas P. Baskin, Commissioner

_/s/_____
R.D. Maynard, Commissioner

ATTEST:

_/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the _3rd__ day of June, 2011, a true and correct copy of the foregoing **ORDER DENYING RECONSIDERATION** was served by regular United States Mail upon each of the following:

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